

# Alternative Burdens on Freedom of Conscience

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## I. INTRODUCTION

Suppose a pharmacist refuses to dispense pills that induce abortion claiming that dispensing such pills runs counter to principles he holds dear. Indeed, the pharmacist claims that forcing him to dispense the pills would violate his freedom of conscience. He even claims that he would

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not have become a pharmacist had he foreseen an obligation to dispense such pills at the time he entered the profession. Should the pharmacist's job be protected if he is making a bona fide claim of conscience? And does it matter whether the pharmacist's objection to dispensing the pills is rooted in religious or nonreligious reasons?

In *The Significance of Conscience*,<sup>1</sup> Kent Greenawalt, in characteristically insightful fashion, discusses a variety of issues about the proper scope and subject matter of claims of conscience. The core of the article, in my view, concerns the protection we should give to nonreligious claims of conscience relative to religious claims of conscience. He argues that we should generally give comparable treatment to nonreligious claims but that there are "special reasons" to accommodate religious claims that ought to factor into our analysis.<sup>2</sup>

In Part II, I discuss Greenawalt's analysis of why religious claims of conscience are entitled to at least some special consideration. In Part III, I propose a method to avoid, rather than resolve, the difficult issue he addresses, at least in a wide variety of contexts. In short, I describe "alternative burdens" that can be imposed on those who make claims of conscience. These alternative burdens can be structured so that claims of conscience are likely to be made only when they are sincere or, at the very least, when claimants would be extremely averse to our refusal to provide an exemption. Moreover, the benefits of using alternative burdens can be obtained without having to determine whether the claim of conscience is rooted in religious or nonreligious considerations. Finally, alternative burdens can be arranged to benefit those who do not make claims of conscience, thereby weakening concerns that claims of conscience are unfair to nonclaimants.

## II. GREENAWALT'S ANALYSIS OF SPECIAL REASONS FAVORING RELIGIOUS CLAIMS

Greenawalt discusses but does not necessarily endorse four possible reasons why one might give greater protection to religious claims of conscience: (1) tradition favors religious claims of conscience, (2) religious claims typically have more at stake for the claimant than nonreligious claims, (3) religious claims of conscience are more likely to be sincere than nonreligious claims, and (4) governments are less competent to

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1. Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901 (2010).

2. *Id.* at 916.

deny religious claims of conscience than nonreligious claims.<sup>3</sup> As I read Greenawalt, he seeks more to examine the weight of these reasons than to use them to reach a definitive conclusion about the relative merits of religious and nonreligious claims.

#### *A. Tradition*

First, Greenawalt notes that we might favor religious claims because we have “a tradition of some accommodation to religious conscience.”<sup>4</sup> Greenawalt does not reveal how strong he takes this consideration to be other than to assert that he finds “the argument from tradition . . . less powerful for legislative choice than for constitutional permissibility” and does “not regard it as decisive even in the latter context.”<sup>5</sup> I take it that Greenawalt is ultimately trying to address the issue of whether we *ought* to favor religious claims over nonreligious claims. On that score, our traditional deference to religious claims tells us little about what our normative commitments should be, though it suggests that religious claimants may expect greater solicitude than do nonreligious claimants.<sup>6</sup>

#### *B. Amount at Stake*

Greenawalt also briefly discusses the argument that we ought to favor religious claims of conscience because “more is at stake for the typical believer.”<sup>7</sup> For example, those who make claims rooted in religion may believe that they will face severe divine punishment for their transgressions. Greenawalt finds the argument problematic because it depends on one’s religious assumptions. “The nonbeliever,” he writes, “may reasonably respond that behaving morally in this life matters more for her than for someone who is convinced that a loving God forgives all confessed sins.”<sup>8</sup>

Greenawalt is no doubt right that whether a particular claim of conscience has more at stake for a religious claimant than a nonreligious

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3. *Id.* at 913–15.

4. *Id.* at 914.

5. *Id.*

6. *Id.* By “nonreligious claimant,” I mean a person who makes a claim of conscience that is not rooted in religious beliefs. A theist can be a nonreligious claimant if the claim happens to be rooted in nonreligious beliefs on a particular occasion.

7. *Id.*

8. *Id.*

claimant depends on the particular situation and beliefs of each claimant. Nevertheless, it may be the case that more is *typically* at stake for the religious claimant. If we believe that more is typically at stake for religious claimants than nonreligious claimants, we have at least some reason to favor religious claimants. But as I will later emphasize, we only have reason to favor religious claimants if we cannot otherwise evaluate what is at stake for claimants without using religion as a rough proxy for the claimant's perceived stake.

### C. Sincerity

A third reason Greenawalt considers for favoring religious claims is that they often provide indicia of sincerity because religious "claimants usually, though far from always, have been attached to religious organizations that share a particular view."<sup>9</sup> So if an Orthodox Jew seeks to take a standardized exam on a Sunday rather than a Saturday, we are more likely to attribute the request to a genuine claim of conscience than to a mere scheduling preference.

Greenawalt would, however, give no special weight on grounds of sincerity to religious claims when "the claim of conscience is one that would be extremely unlikely to be made insincerely."<sup>10</sup> As an example, he suggests that "[n]urses are unlikely to refuse to participate in sterilizations, for example, unless they have a sincere objection because there is no independent advantage to be gained by nonparticipation."<sup>11</sup> As I will discuss later, we can help ensure that claims of conscience are made sincerely by creating burdens that remove the advantages that might otherwise be gained by making claims of conscience.

### D. Competency To Evaluate

A fourth reason for favoring religious claims, according to Greenawalt, is that "the government is not highly competent to evaluate assertions of religious truth and should steer clear of them when it can."<sup>12</sup> By contrast, "[n]onreligious claims of conscience are more likely either to reflect individualized reactions that avoid general claims about truth or to rest on claims whose evaluation by the government is more acceptable."<sup>13</sup> So, for example, "[i]f the claimant relies on secular reason to conclude that

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9. *Id.* at 915.

10. *Id.*

11. *Id.*

12. *Id.* at 914.

13. *Id.*

in all circumstances withdrawing life support is killing, the government may respond that this view is unreasonable given a dominant opinion to the contrary within the medical community and among others who have thought carefully about the issue.”<sup>14</sup>

To evaluate the matter, we need to more clearly distinguish two different meanings of *competency* when we speak of the government’s competency to evaluate claims. One meaning concerns the government’s ability to reach an answer that is epistemically warranted given available information. On this dimension, it is by no means clear that governments are better at evaluating nonreligious claims than religious claims. Consider ordinary empirical claims first.<sup>15</sup> As Greenawalt acknowledges, “[S]ome general claims based on religious premises may be shown to be mistaken by nonreligious reason.”<sup>16</sup> For example, he notes that a religious believer may “conclude[] that he cannot fight in a war because the United States is aiming only to expand its control of oil reserves and is wantonly killing innocent civilians. Both of these factual premises could be wrong and known to be so by relevant government officials and well-informed outsiders.”<sup>17</sup> So a claim of conscience like this one, grounded principally in disputed empirical claims, can be addressed by the government with about the same level of competency regardless of whether the claim of conscience is grounded in religious or nonreligious concerns.

Other sorts of empirical claims may refer to the beliefs of a group of people. For example, a person may claim that his religious community generally agrees that he must refrain from some activity. Suppose, however, that he is mistaken. His religious community, however he defines it, imposes no such requirement. In situations like this one, government actors (like judges and legislators) do have means of assessing the truth. To uncover the widely shared beliefs of a community of religious observers, we can explore those tenets just as we would explore the principles and beliefs underlying the tenets of some other group, like the community of organic chemists. Both investigations concern beliefs and principles of a community that are not a matter of general knowledge,

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14. *Id.*

15. By “ordinary” empirical questions, I follow Greenawalt’s usage. *Id.* at 915 n.20 (“I add the word *ordinary* to put aside such questions as whether Jesus performed miracles and whether his body was resurrected after his death.”).

16. *Id.* at 914.

17. *Id.* at 915.

and both are difficult to conduct. Nevertheless, we routinely evaluate beliefs of members of the scientific community in court and in legislative bodies and could do the same for evaluations of the beliefs of religious adherents. Courts infrequently analyze dominant religious opinion, I suspect, not because they are especially incapable of doing so but rather because U.S. law and tradition discourage it.

Government actors can fairly be tasked with evaluating empirical matters because we have some generally agreed upon methods of legitimate empirical inquiry. It is far more difficult to assess government competence at evaluating matters of value. We have no widespread agreement about how one ought to assess value claims, so it is especially difficult to compare governments' epistemic ability to assess religiously laden claims about value to nonreligious claims about value. In fact, one might think that the government has some epistemic ability to adjudicate claims of conscience that are principally empirical in nature (whether religious or nonreligious) but that the government ought not adjudicate claims of conscience that rely principally on disputed claims of value (whether religious or nonreligious).

Even if government actors have limited ability to resolve value disputes, they nevertheless do make value judgments, explicitly or implicitly, all the time. So we seem to have decided that courts and legislatures are good enough at the task. But Greenawalt does not give us reason to believe that government actors are better, from an epistemic perspective, at resolving secular value disputes than religious ones. Interestingly, when Greenawalt asserts that government may be better at adjudicating nonreligious claims of value than religious claims of value, he gives an example that essentially converts a question of secular value into an empirical question. As noted earlier, he writes, "If the claimant relies on secular reason to conclude that in all circumstances withdrawing life support is killing, the government may respond that this view is unreasonable given a dominant opinion to the contrary within the medical community and among others who have thought carefully about the issue."<sup>18</sup> The claimant, who purports to have some secular reasons for thinking that it is always wrong to withdraw life support, is told that his view is wrong because it conflicts with the opinions of others who are said to know more than he does.

Such arguments from authority do not hold much sway, however, against a claim of value. They also reach the wrong results whenever a claim of conscience is, so to speak, ahead of its time. A city bus driver

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18. *Id.* at 924.

who refuses to drive a racially segregated bus ought not cease his resistance because leading thinkers in his community, however defined, see the matter differently. True, if we convert claims of value to empirical claims, government actors may have better tools of analysis. But the conversions are themselves dubious. Moreover, if we could convert secular claims of value to empirical claims about dominant secular opinion, then we can presumably do the same for religious claims of value. If a religious claimant believes that it is always wrong to withdraw life support, then the government could empirically investigate whether the claimant's view is dominant among knowledgeable members of the claimant's religion. Of course, there will be difficult questions to resolve about who constitutes the relevant pool of experts. But the same is frequently true for secular determinations.

Presumably, judges are more familiar with dominant secular values than the values held by the various religious claimants that might enter the courthouse. But we frequently expect judges to understand the operation of unfamiliar businesses and areas of science. We might even doubt that long-term familiarity with some community's values contributes to expertise in actually making all-things-considered values determinations. Granted, it would be quite surprising if the government had precisely equal epistemic ability to examine religious and nonreligious claims of conscience. Overall though, I do not think that Greenawalt has made the case that governments are generally more competent, from an *epistemic perspective*, at evaluating one sort of claim than the other.

Greenawalt's argument, however, concerns more than just governments' epistemic abilities. He also states that a government's "exercise of judgment [is] more appropriate, in respect to nonreligious moral claims than religious ones."<sup>19</sup> By "appropriate," I take Greenawalt to mean that, independent of governments' epistemic abilities, there may be moral or political reasons to discourage governments from adjudicating certain kinds of disputes about religion and religious texts. For example, Greenawalt elsewhere discusses nonreligious justifications for religious liberty, including the possible claim that "based on political analysis and history, . . . destructive conflict, suffering, and resentment occur when religious groups compete for political favor and the government sticks

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19. *Id.* at 915.

its fingers into society's religious life."<sup>20</sup> If we accept that claim, we may indeed have greater reason to avoid adjudicating religious claims of conscience than nonreligious claims. I emphasize only that such grounds would be about competency in the sense of "appropriateness" rather than competency in the sense of "epistemic ability."

### *E. Summary*

After walking through the four considerations discussed above, Greenawalt writes that "[t]he general lessons to be drawn from this analysis are debatable."<sup>21</sup> Although he finds that the reasons to respect religious and nonreligious claims are sufficiently similar to warrant comparable treatment, he also recognizes special reasons to accommodate religious conscience:

I conclude that for most subjects as to which both religious and nonreligious claims of conscience about moral requirements are likely to arise, any right of conscience should include the nonreligious claims. That is both because the claims are similar enough to warrant comparable treatment and because there is some reason to accommodate deeply held convictions even when they are demonstrably mistaken. Nevertheless, the special reasons to accommodate religious conscience should be a crucial part of the discussion whether any right or privilege should be granted.<sup>22</sup>

So, even though Greenawalt recognizes weaknesses in the proffered rationales for favoring religious claims and even though he would recognize nonreligious claims of conscience in many or perhaps even most of the contexts in which he would recognize religious claims, he believes that there are some special reasons to favor religious claims of conscience. I have taken issue with some of Greenawalt's analysis but have not sought to refute his central claim. In the next part, however, I will suggest that courts, legislatures, and employers can, under a wide variety of circumstances, avoid distinguishing between religious and nonreligious claims of conscience and still accomplish many of the goals that motivate Greenawalt's analysis.

## III. ALTERNATIVE BURDENS

None of the reasons Greenawalt considers for favoring religious claims of conscience imply that religious claims are intrinsically more

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20. Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1438–39 (1999).

21. Greenawalt, *supra* note 1, at 915.

22. *Id.* at 915–16.



worthy than nonreligious claims. As opposed to arguments favoring religious observance as itself an important good or as a path to recognizing divine will, the reasons Greenawalt considers focus on likely correlates of religion. We considered the possibility that, relative to nonreligious claimants, religious claimants (1) generally have more at stake, (2) are more likely to be sincere, and (3) present claims that are more difficult or inappropriate for secular governments to analyze.<sup>23</sup> But even if these are reasonable generalizations, they will sometimes lead us astray.

Given that we have only identified rough generalizations about religious claims, we could engage in more careful case-by-case analysis to determine whether the generalization holds in a particular case. If we only care about certain characteristics of claims of conscience, we could just evaluate individual claims (or perhaps categories of claims) in terms of the extent to which they have the desired characteristics. For example, for a given claimant, we could consider the claimant's perceived repercussions of failure to receive an exemption, the indicia of sincerity surrounding the claim, and the difficulties the claim poses for secular evaluation. All of these characteristics can be evaluated for both religious and nonreligious claims.<sup>24</sup>

Absent interests uniquely and directly tied to the religious nature of a claim of conscience, for example that the claim actually reflects divine will, the only reason for treating religious claims as a category is that it is difficult and costly to engage in a case-by-case analysis of all claims of conscience. So, for example, rather than evaluating the sincerity of every claim of conscience, we might rely on the presumed fact that religious claims are more likely to be sincere, all else being equal. One

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23. I put aside the claim that, all else being equal, tradition favors religious claims of conscience. Although it may be true, it tells us little, if anything, about whether we ought to continue to favor religious claims of conscience in the future.

24. Greenawalt advocates examining the merits of particular nonreligious claims of conscience in at least some contexts. See Greenawalt, *supra* note 20, at 1473 (“[A]t least when claims of nonreligious conscience are common and can be feasibly assessed by a screening process, constitutional considerations of equality require equal treatment.”). Greenawalt is reluctant, however, to always give nonreligious claims the same opportunities to be heard that we give to religious claims. He states that “courts should not dismiss without examination atheist claims that are parallel to religious claims,” *id.* at 1469, but “[t]he law may appropriately require that religious belief or practice be a condition for a valid claim to exemption from [rules requiring compulsory education or work on the Sabbath], instead of providing for individual assessment of the strength of other claims,” *id.* at 1472.

problem with such a presumption, however, is that it systematically favors religious claimants over nonreligious claimants. It may also lead to suboptimal results, when, for example, a nonreligious claim of conscience is strongly tied to the claimant's happiness and sense of self, has strong indicia of sincerity, and cannot be easily resolved by courts or other government actors.

I will highlight a different approach: we can provide alternative burdens that claimants must accept in order to be relieved of the obligations to which they initially sought exception. So, to use a familiar case, if a person drafted into the military claims to be a conscientious objector, he could be required to serve the country's interests in some nonmilitary capacity. As a matter of terminology, I will say that this hypothetical claimant faces an "initial burden" (the obligation to provide compulsory military service) but is also offered an "alternative burden" (to serve compulsory community service). We have offered claimants alternative burdens on occasion, but they can surely be offered more frequently. Greenawalt has himself endorsed the creation of alternative burdens, at least in some contexts,<sup>25</sup> and appears to support their more frequent availability.<sup>26</sup>

#### A. *Onerous Alternative Burdens*

One way to promote goals Greenawalt treats as desirable is to select alternative burdens that most people will view as more onerous than the initial burden. Suppose the government has enacted a two-year term of mandatory military service during wartime. If the alternative burden provides for two years of mandatory community service, many will view it as less onerous than the military service because wartime military service carries much higher risks of morbidity and mortality than community service does. By contrast, if the alternative burden requires

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25. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 327–28, 330–31 (1987) (advocating alternatives to compulsory military services and to compulsory taxation that are "[r]oughly equal" in burdensomeness or even "moderate[ly]" more unfavorable than the compelled behavior); 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 53–54 (2006) (defending alternatives to compulsory military service); Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 *AVE MARIA L. REV.* (forthcoming 2010) ("Let those opposed in conscience to paying certain taxes pay the amount owed plus an extra amount to some other valuable endeavor.").

26. See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 316–17 (2008) (supporting "self-selection" schemes that provide relief from laws of general applicability by, for example, allowing people to pay for the privilege not to wear a motorcycle helmet).

four, five, or six years of mandatory community service, the alternative burden may be generally viewed as more onerous than the initial burden.

The onerousness requirement promotes two of the considerations that Greenawalt identifies. It reduces the risk of insincere claims of conscience by giving people less incentive to make bogus claims. It also tests the claimant's aversiveness to the initial burden. If he is not especially averse, the claimant is unlikely to accept what is generally perceived as an onerous alternative burden. Thus, by creating substantial alternative burdens, we can promote claims that are sincere (or that at least reflect extremely strong preferences) without having to distinguish between religious and nonreligious claims of conscience.<sup>27</sup> The onerousness requirement also reduces the actual or perceived unfairness of claims of conscience to those who comply with the initial burden. To the extent that claimants end up with burdens that nonclaimants find onerous, nonclaimants will not envy claimants and will not consider the claimant to have received especially advantageous treatment.

### *B. Beneficial Alternative Burdens*

A second way to promote goals Greenawalt treats as desirable is to select alternative burdens that benefit those adversely affected by the claim of conscience. Rather than, say, giving people a choice between accepting the initial burden and going to prison (an onerous but not widely beneficial alternative burden we frequently use today) the alternative burden should be one that produces a net benefit, at least for those affected by the claim of conscience and preferably for society as a whole. Providing a four-year term of community service to conscientious objectors might produce greater social surplus than forcing objectors to engage in two years of wartime military service that they claim to deeply

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27. The proposal also eases the government's obligation to closely examine—and perhaps be viewed as endorsing—grounds for exemption that many find deeply offensive. For example, a number of soldiers have sought relief from duty on grounds of conscience based on the likely repeal of the military's "Don't Ask, Don't Tell" policy. See Tamar Lewin, *A Hot Line Grapples with Evolving Appeals for Conscientious Objector Status*, N.Y. TIMES, July 18, 2010, at A13. Similarly, at least one female soldier has sought relief from duty on the grounds that she is a born-again Christian who has "come to believe that a woman's place [is] in the home, raising a family." *Id.* Even if these particular claims have weak legal grounds, any system that closely examines the substance of claims of conscience and only sometimes grants exemptions is bound to generate controversial decisions.

oppose and might even satisfy with halfhearted performance or outright sabotage. Relative to the world that does not provide the claim of conscience, society is better off because it receives four years of (possibly wholehearted) service from the claimant, and the claimant is better off because, in accord with his expressed preference, he is relieved of the initial burden that would have deeply disturbed his conscience.<sup>28</sup>

To give an example similar to one posed by Greenawalt,<sup>29</sup> suppose an attorney at a government agency refuses, as a matter of conscience, to work on a particular case. As an alternative burden, the agency could require the attorney to work additional hours—some amount greater than his ordinary obligations—in exchange for granting the claimant’s requested reassignment. Again, the claimant is better off because the initial burden would have deeply disturbed his conscience, and the agency and its employees are better off because they get the benefit of additional labor that can ease the workload of other employees.

By requiring that alternative burdens at least benefit those affected by claims of conscience (and preferably benefit society as a whole), we reduce the actual or perceived unfairness of respecting the claim. Other agency employees, for example, will generally not mind that a peer has refused to work on a particular matter because the claimant has had to take on some more onerous alternative burden. Employees also know that they may have their own grounds for making a claim of conscience in the future, regardless of whether they are theists or atheists. Moreover, requiring a social benefit decreases the importance of identifying sincere and insincere claims of conscience. Even if some insincere claimants are granted exemptions, at least they have undertaken alternative burdens that improve the lot of nonclaimants (and hopefully of society more generally).

The “social benefit” requirement also addresses the following objection: In a world with claims of conscience but without alternative burdens, people will probably be more likely to follow the dictates of conscience. If we believe that following one’s conscience is generally a good thing, alternative burdens are bad because they burden conscience.

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28. I am not endorsing compulsory military service or community service as general policies. I am only noting that, in a society that endorses both, community service can serve as a good alternative burden. Also, when selecting alternative burdens, there may be situations in which a person has a claim of conscience against both an initial burden and an alternative burden. In some such cases, we could provide a further alternative to the original alternative burden.

29. Greenawalt, *supra* note 1, at 904–05.

A system of alternative burdens will lead some people to engage in activities that at least somewhat trouble their consciences.

The “social benefit” requirement weakens this criticism. In a world that provides no self-interested incentives to government actors and private employers to permit claims of conscience, they are unlikely to permit claims of conscience except in extreme cases. By contrast, if alternative burdens provide some benefits to enterprises, those enterprises will permit claims of conscience in more contexts. So even though alternative burdens discourage people from making claims of conscience by requiring the satisfaction of alternative burdens, alternative burdens also encourage public and private enterprises to allow people to make claims of conscience under a broader set of circumstances.

There is much to consider when crafting alternative burdens. In some situations, there may be no appropriate alternative burden. But in a wide variety of contexts, we can create good alternative burdens. Some such burdens may be financial. For example, the pharmacist who refuses to prescribe pills that induce abortion might have his salary reduced by the amount of the pharmacy’s lost business. Alternatively, the pharmacist could have his salary reduced by the additional costs of hiring a part-time pharmacist or an on-call pharmacist willing to prescribe the medication.

I have argued that a system of alternative burdens should make nonclaimants better off, but there is much room to debate how demanding this requirement should be. A strong version would require that *every instance* in which an exemption is granted makes everyone better off than they would have been if this particular exemption had been denied. A weak version would require that the existence of the alternative burden *scheme* makes others better off (or at least leaves them no worse off) even if each individual instance of granting an exemption does not improve everyone’s lot.

Let me illustrate the weak version of the requirement in the organ donation context. Currently, we allow people to withhold consent to the transplantation of their organs after death, even though those organs might someday have saved a life. We could, however, pass a law of general applicability requiring hospitals to salvage all cadaver organs that are eligible for transplantation but grant exemptions to those who

believe that organ transplantation violates their freedom of conscience.<sup>30</sup> Some such claims will be religious in nature, but others will not. For example, some atheists may deeply and steadfastly believe that one's postmortem body should not be treated as government property for purposes of redistribution.

Regardless of whether claims are religious or nonreligious, however, claimants must agree to the alternative burden. In the organ donation context, the burden to the claimant could consist of a loss of a benefit. For example, we could make it so that a person who gets an exemption is given reduced priority to receive an organ if he should need one during his life.<sup>31</sup> We could make the reduction in priority small or large in magnitude and have a short or long duration.

A reduction in priority to receive an organ provides the two desirable characteristics of alternative burdens that I described. First, such a system creates an onerous burden on claimants because many or most people would think it worse to reduce one's life expectancy through priority reduction than to give up organs after death that would otherwise decay in the ground or be incinerated. Second, the system creates a benefit for nonclaimants who are nevertheless affected by the exemption. Though they are deprived of the potential lifesaving organs of claimants, they are benefited because they all have slightly higher priority than they would have had if we simply allowed people to opt out of the organ donor pool without penalty.

Under this particular scheme, nonclaimants receive a limited benefit when someone claims an exemption: their priority to receive an organ increases slightly because someone else in the potential organ recipient pool is given lower priority. On the other hand, depending on how the priority reduction is structured, nonclaimants could be worse off relative to a world with mandatory organ salvaging that prohibits exemptions. Allowing exemptions means that claimants who would never contribute to the organ supply still have some access to withdraw organs. On a probabilistic basis, each exemption reduces the expected size of the pool of organs available to nonclaimants. So, if we applied a strong version of the requirement that each instance of exemption must benefit everyone, this particular system of alternative burdens would fail.

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30. I take no position here on the constitutionality of such a law. The exemption might play an interesting and important role in the analysis.

31. I defend a similar proposal in much more detail in Adam J. Kolber, *A Matter of Priority: Transplanting Organs Preferentially to Registered Donors*, 55 RUTGERS L. REV. 671, 673 (2003). See also Adam Kolber, *The Organ Conscription Trolley Problem*, AM. J. BIOETHICS, Aug. 2009, at 13, 13–14.

On the other hand, it could be the case that the general requirement to donate one's organs increases supply so much that it makes most people much better off, perhaps so much so that it drastically reduces the shortage of transplant organs. And if such an organ donation scheme is only politically or constitutionally feasible by adding the ability to make claims of conscience, then we can meaningfully say that nonclaimants are better off in a world where legislation mandates organ retrieval yet provides an exemption on grounds of conscience. Such a scheme would satisfy the weak requirement by being widely beneficial as a whole, even if it failed to satisfy the strong requirement because particular instances of exemption may not benefit everyone.

#### IV. CONCLUSION

Rather than taking on the difficult task of weighing the merits of individual claims of conscience—be they religious or nonreligious—we can establish alternative burdens in many contexts that will roughly do the job for us. By doing so, we need not be especially concerned that people will make bogus claims of conscience. Some claimants may simply have deep-seated aversions to complying with a particular law, even if their aversions do not amount to what we traditionally think of as claims of conscience. Whether or not we deem such claimants to be making genuine claims of conscience is not especially important. There is something to be said for not forcing people to engage in behaviors they find deeply aversive, especially when we can channel their energies or resources toward alternatives that provide other more substantial societal benefits. So, there may be reasons to implement alternative burdens to promote goals other than just protecting freedom of conscience. Nevertheless, a system of alternative burdens will frequently still have the side benefit of promoting freedom of conscience.

I described my alternative burden proposal at a very schematic level. In principle, these alternative burdens could be implemented by legislatures, administrative agencies, public employers, private employers, and others. Depending on one's general policy preferences, the burdens can be very onerous or relatively modest. Similarly, the expected societal benefit from an exemption can be big or small, widely shared or more exclusive. No doubt there are other desirable characteristics these alternatives could have that I do not discuss. No matter the details, however, a system of alternative burdens will often achieve important policy goals without

having to make difficult assessments of the relative merits of religious and nonreligious claims of conscience.